

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1461

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROLAND SMITH,

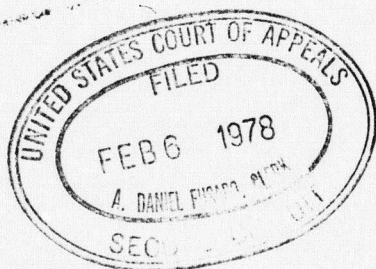
Defendant-Appellant.
-----x

Docket No. 77-1461

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P/S

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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-against-

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Defendant-Appellant.

Docket No. 77-1461

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether appellant's confession, which was involuntary and taken in violation of his rights under the Juvenile Delinquency Act, should have been suppressed.

2. Whether the sentence imposed on Count Two must be vacated because, upon conviction of the two counts charged, the crimes merge.

STATUTES INVOLVED

Title 18, United States Code

§5031. Definitions

For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

As amended Sept. 7, 1974, Pub.L. 93-415, Title V, §501, 88 Stat. 1133.

§5032. Delinquency proceedings in district courts; transfer for criminal prosecution

A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to an appropriate district court of the United States that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles.

If the Attorney General does not so certify, such juvenile

shall be surrendered to the appropriate legal authorities of such State.

If an alleged juvenile delinquent is not surrendered to the authorities of a State or the District of Columbia pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile sixteen years and older alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death, criminal prosecution on the basis of the alleged act may be begun by motion of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice.

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record,

in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

As amended Sept. 7, 1974, Pub.L. 93-415, Title V, §502, 88 Stat. 1134.

§5033. Custody prior to appearance before magistrate

Whenever a juvenile is taken into custody for an alleged

act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

As amended Sept. 7, 1974, Pub.L. 93-415, Title V, §503, 88 Stat. 1135.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable John M. Cannella) rendered on September 6, 1977, after a trial before a jury, convicting appellant Roland Smith of bank robbery (18 U.S.C. §2113(a)), armed bank robbery (18 U.S.C. §2113(d)), and conspiracy to commit bank robbery (18 U.S.C. §371). Appellant was sentenced to five years' imprisonment on the conspiracy count and to eight years on each of the bank robbery counts, the sentences to run concurrently.

By order of this Court dated November 21, 1977, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

On March 30, 1977, three men robbed the National Bank of North America at 200 Lexington Avenue.* On April 4, 1977, a complaint was filed and warrants issued by The Honorable Harold J. Raby for the arrest of appellant Roland Smith and Stanley McDuffie (Record on Appeal, Document #1). Both were taken into custody three days later.

*A fourth man allegedly waited outside the bank with the getaway car.

A. The Transfer Hearing

As appellant Smith was 17 years old -- his date of birth is September 15, 1959 -- the Government proceeded under 18 U.S.C. §5032 to prosecute his case in federal court, and then moved to transfer him to adult status. A hearing was held before Judge Brieant on May 12, 1977, at which various parole and probation officers testified that appellant had an I.Q. of 57, which was described as "mild mental retardation" (T.16-17),* "very seriously handicapped" (T.58), or "a slight hair between a moron and a mental defective" (T.50). However, the officers expressed the opinion that appellant's emotional problems had lowered his performance on the test** (T.19, 42). As a child, appellant had been placed on home study and later attended a school for those with learning disabilities; he was occasionally sedated so that he could function in a classroom (T.19, 27, 38). Based primarily upon appellant's repeated conflicts with the law, the court transferred him to adult status, after which he was indicted for the crimes of bank robbery, armed bank robbery, and conspiracy.***

*Numerals preceded by "T" refer to pages of the transcript of the transfer hearing, which were sealed by Judge Brieant.

**Though none of the witnesses was a psychiatrist or psychologist, Judge Brieant concluded that appellant's intelligence was greater than the score indicated (T.83).

***The indictment is reproduced as B of the separate appendix to appellant's brief.

B. The Suppression Hearing

Appellant moved to suppress his confession on the ground that it was involuntary and taken in violation of his rights under the Juvenile Delinquency Act (18 U.S.C. §§5032, 5033). A hearing was held before Judge Cannella on June 15, 16, and 20, 1977.*

The Government's witnesses testified to the following facts: After learning from the FBI that appellant was wanted for bank robbery, two New York City detectives -- Carbone and Fox -- arrested appellant at his home in Brooklyn on April 7, 1977, at 10:20 a.m. (S.II 2, 3, 8). In the presence of Ida Brown (his grandmother and legal guardian), appellant was told of the bank robbery charge and given Miranda warnings. Appellant answered affirmatively when asked if he understood the warnings (S.II 4, 5). Detective Carbone gave appellant's grandmother his name and telephone number; she called twice before 3:00 p.m. to inquire as to appellant's whereabouts (S.II 6, 8, 9).

The detectives took appellant to the 84th Precinct, where he was turned over to two FBI agents at 10:30 a.m. (S.I 8; S.II 7). Because appellant was a juvenile, the agents took him directly to the United States Attorney's office,** rather than to FBI headquarters, for processing (S.III 33). En route, one

*Minutes of these proceedings, which are separately paginated, are hereinafter referred to as S.I, S.II, and S.III, respectively.

**They arrived shortly after 11:00 a.m. (S.I 22).

of the agents read appellant his rights, using the adult form since he had never before arrested a juvenile (S.I 27). As the Assistant United States Attorney assigned to the case was unavailable, appellant was taken to the marshal for fingerprinting, and then to a pretrial services officer for a bail interview (S.I 22). After the conclusion of the interview at 12:15 p.m., the officer called appellant's grandmother (some time between 12:30 and 2:30 p.m.) to verify the information the youth had provided (S.III 34, 35). Though the probation officer did not remember all the grandmother said during their conversation, he did recall her asking him to call back with the results of the bail hearing (S.III 36, 37).

At about 12:50 p.m., the Assistant United States Attorney, John Flannery, who was assigned to the case, learned from the District Attorney of New York County that the latter's office would not prosecute (S.III 18, 19, 20). Mr. Flannery discussed the facts of the case with the agents and read the complaint. Flannery was then aware that an accomplice had implicated both appellant and McDuffie (who was arrested later in the day) and that the stolen money and weapon had not been recovered; in addition, the fourth accomplice had not been apprehended (S.III 24). After reviewing the provisions of the Juvenile Delinquency statute, the Assistant United States Attorney asked a probation officer to attend appellant's interrogation (S.I 31; S.III 19, 20). However, neither Mr. Flannery nor the agents made an effort to contact appellant's grandmother, although they were

aware that she was appellant's guardian, and Mr. Flannery admitted feeling some "concern" at the time about his failure to contact her (S.III 21, 29; S.I 27, 28).^{*} Flannery called the magistrate's office and spoke to The Legal Aid Society office so that an attorney could be assigned at arraignment (S.III 26).

At 1:45 or 1:50 p.m., appellant was taken to Flannery's office, where the Assistant United States Attorney introduced himself, the two FBI agents, and the probation officer (S.III 22). Appellant was told that he had been arrested for bank robbery, "a serious offense because it carries with it a very serious penalty involving 20 years and a \$1,000 fine (S.III 22). Appellant was again read the standard warnings, in response to which he said "yes," "nodded," or "grunted" (S.I 30; S.III 30). Appellant was then questioned for 45 minutes to an hour (S.I 26), during which he confessed to the crime, supplying various details about its commission. At about 3:00 p.m., he was taken to the magistrate and counsel was assigned (S.I 26).

The court denied the suppression motion in a memorandum decision** in which it found that appellant had received proper Miranda warnings. Judge Cannella rejected appellant's argument that statements made prior to a transfer hearing must be excluded under 18 U.S.C. §5032, and additionally found no violation of appellant's rights under §5033 to a prompt arraignment and the assistance of his guardian.

^{*}During his telephone conversations with appellant's grandmother, Detective Carbone told her that appellant had been turned over to the FBI and delivered to the United States Attorney's office.

^{**}The complete text of Judge Cannella's decision is reproduced as D to the separate appendix to appellant's brief.

C. The Trial

Appellant's confession, recounting details of the crime, constituted the key evidence against him (249-260).^{*} In the prosecutor's words, "there is no identification issue in this case. You have got the confession of Roland Smith" (330). Two bank employees who were witnesses to the crime testified, but neither had selected appellant at a lineup or could make an in-court identification (Mach: 57-59; Marrow: 69-18, 69-19). Bank surveillance photographs were introduced, but the robber purported to be appellant looked so unlike him that blowups of the photographs were made at the request of the defense (4, 80) and the dissimilarity was the basis of the defense argument in summation (315, 324). Appellant's fingerprints and palm prints were taken but did not match those left by the bank robbers (275-279).^{**}

Aside from the confession, the Government's case rested upon the accomplice testimony of Stanley McDuffie and Fred Bellamy, both of whom had pleaded guilty to the bank robbery and were awaiting sentence (87, 123-124, 192-194). McDuffie and Bellamy had previously been convicted of robbery, and the latter had pleaded guilty to two unrelated bank robberies for which he had not been sentenced (193-198). Although the two

^{*}Numerals without letter designations refer to pages of the trial transcript dated July 13-19, 1977.

^{**}This evidence was introduced through the FBI case agent, who was the sole defense witness.

contradicted themselves and each other with respect to numerous aspects of their testimony, their story was basically as follows: Bellamy, having successfully robbed the East New York Savings Bank, suggested to McDuffie that they join with several others to rob the same bank (89-92, 151). The night before the robbery they enlisted appellant ("Man") and "E.J." (Ernest Bathea) to assist in the endeavor (93, 95-96, 206). The morning of March 30, 1977, the four men drove to Manhattan, but modified their plans because of the number of policemen in the area of the bank (109, 165). Shortly afterward, their car broke down; they abandoned the vehicle and walked uptown until, by chance, they came upon another bank. Bellamy and McDuffie inspected the premises and then convinced the other two not to pass up the opportunity (110-111, 166-170). E.J. remained outside to hail a cab, while Bellamy entered the bank and pulled out a shotgun (which E.J. had supplied) (156, 170-177). McDuffie and appellant leaped over the teller's counter, seized approximately \$11,000, and all three departed in haste. They took a cab* to Brooklyn, where they split up the money (112-113, 120-122, 175-177).

Although McDuffie initially testified that appellant had jumped over the counter with him, he recanted when shown the surveillance photographs, at which time he claimed that the

*The FBI located the cab driver, who could not make a positive identification of appellant. The Government did not call him as a witness and the defense was denied a continuance to produce him (269-274).

man beside him "looked like E.J." (118). Though repeatedly pressed to state that his recollection was clear despite his confusion over the photograph, McDuffie equivocated further:

THE COURT: Is there any doubt that Smith went over the counter with you? Is there any question in your mind?

THE WITNESS: Like I say, I can't really answer that, you know.

(119).

. . .

Q. What was Roland Smith's job?

A. To help pick up some of the money.

Q. Is that what he did?

A. Yes, he helped.

Q. Did he do that behind the teller's counter?

A. Probably did, yes.

(120).

. . .

THE COURT: What you are telling this jury is that the pictures are not that clear now and you can't identify him in the pictures, is that right?

THE WITNESS: Yes.

THE COURT: But there is no question in your mind as to what actually happened?

THE WITNESS: You are right to a certain extent.

(121).

McDuffie, who testified under a grant of immunity, admitted that he was aware that he ran the risk of committing perjury and was

concerned that his testimony be consistent (71, 133). Bellamy's assertions that appellant took part in the robbery were contradicted by his prior statement to the agents that he did not know appellant when shown his photograph (200-201, 226-228).

The jury interrupted its deliberations* to request the "testimony of FBI Agent Bernard regarding confession of Roland Smith" as well as the photographs and blowups (371-372).

Appellant was found guilty of all three counts (372) and was sentenced, as an adult, to eight years on the bank robbery counts and five years on the conspiracy count, the sentences to run concurrently.*

*The complete text of the court's charge is reproduced as C to the separate appendix to appellant's brief.

**Bellamy, who planned the robbery and carried the shotgun, and McDuffie, who slapped a teller during the robbery (69-4; 380), received six-year sentences; Ernest Bathea, who supplied the shotgun, pleaded guilty and was sentenced under the Youth Corrections Act. All three men had prior records and were in their twenties.

ARGUMENT

Point I

APPELLANT'S CONFESSION, WHICH WAS INVOLUNTARY AND TAKEN IN VIOLATION OF HIS RIGHTS UNDER THE JUVENILE DELINQUENCY ACT, SHOULD HAVE BEEN SUPPRESSED.

Appellant Roland Smith, a 17-year-old of extremely low intelligence, was arrested upon a complaint and warrant, but was not brought before a magistrate until after a confession had been extracted. Appellant's grandmother, who was his legal guardian, was present at the arrest when appellant was given his rights and informed of the charges, but was never offered an opportunity to confer with appellant or to assist him during the interrogation, although she had revealed her concern by repeated telephone calls to the arresting officer. The confession was extracted under coercive conditions in which appellant was surrounded by four adults and told at the outset that he faced a possible 20 years' imprisonment and a \$1,000 fine (S.III 22). As the confession was involuntary and additionally was taken in violation of appellant's rights under the federal Juvenile Delinquency Act (18 U.S.C. §§5032, 5033) to be brought before a magistrate forthwith and to confer with his guardian, and since the statements were taken prior to his transfer hearing, the evidence should have been suppressed.

A. The failure to take appellant before a magistrate forth-
with was error.

Following his arrest at 10:15 a.m. on April 7, 1977, appellant was taken to the police station and turned over to FBI agents. Shortly after 11:00 a.m., the agents arrived with appellant at the office of the United States Attorney for the Southern District of New York. Since the Assistant United States Attorney assigned to the case was unavailable, appellant was taken to the marshal's office for processing, and then to a pretrial services officer for a bail interview. At 1:50 p.m., appellant was interrogated for nearly an hour by an Assistant United States Attorney, during which time he confessed to participation in the bank robbery. It was only after the confession had been secured that appellant was taken for arraignment. Since this delay was unreasonable and violated appellant's rights under 18 U.S.C. §5033, a reversal is mandated.

The relevant portion of §5033 provides that, following arrest,

[t]he juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

In United States v. Binet, 442 F.2d 296 (2d Cir. 1971), and United States v. Glover, 372 F.2d 43 (2d Cir. 1967), which dealt with similar language in the predecessor statute of §5033,*

*Former §5035 provided that "[u]nless the juvenile is taken 'forthwith' before a committing magistrate, detention shall not

this Court recognized the strong Congressional concern expressed therein for protection of the rights of juveniles. As the Court stated in those cases:

... *Miranda v. State of Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1062, 1612, 16 L.Ed.2d 694 (1965), held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." In the case of a juvenile, compliance with the mandate of the Juvenile Act should be the minimum requirement of such safeguards. Treatment of an accused juvenile after arrest as a chattel in the possession of the officers, deliverable at will to the inspectors' offices for interrogation is a plain departure from the command of the statute for forthwith production of the juvenile before a magistrate. Statements taken while the statute is being ignored in this fashion must be held inadmissible.

United States v. Binet, supra,
442 F.2d at 299.

The facts of the instant case are strikingly similar to those in *Binet*, where the defendant was brought to the United States Courthouse where a magistrate was "presumably available" (*id.*, 442 F.2d at 299) but was not brought before a magistrate and given "unbiased advice" (*id.*) of his constitutional rights until after he had been questioned by an Assistant United States Attorney in the presence of two other law enforcement officers.

(Footnote continued from the preceding page)

'be for a longer period than is necessary to produce the juvenile before a committing magistrate.'" *United States v. Glover, supra*, 372 F.2d at 46; emphasis supplied by the Court.

The delay in this case was even less justifiable than that in Binet and Glover. In contrast to those cases, appellant's arrest was predicated upon a complaint secured by the United States Attorney's office as well as a warrant which ordered the arresting officer to take appellant "forthwith before the nearest available United States Magistrate...." The district court's finding that the interrogation by the Assistant United States Attorney "was necessary both for bail purposes and to aid in the apprehension of the fourth bank robber" is clearly erroneous. The Assistant requested a high bail based upon the nature of the crime (S.III 31-32), the details of which he knew prior to the interrogation from reading the complaint and speaking to the agents. Moreover, the questioning occurred after appellant had completed a bail interview with a pretrial services officer. The prosecutor's explanation about the need for bail information is no more convincing here than it was in United States v. Duvall, 537 F.2d 15, 23-24 n.9 (2d Cir.), cert. denied, 96 S.Ct. 3173 (1976). The argument that the interview was required to locate the fourth bank robber -- Ernest Bathea -- is belied by the questions asked, which were primarily directed at extracting an admission of appellant's guilt. From inquiries about his background, he was suddenly asked how long he had known McDuffie (for whom a warrant had already been issued and whose whereabouts were known); then the Assistant asked how appellant happened to be in the bank that day, which precipitated the confession (255-256).

Because appellant had been transferred to adult status,* Judge Cannella concluded that he did "not need the depth of protection" extended to Binet** and Glover. This conclusion is erroneous, for the protection of §5033 extends to any "juvenile" who is "taken into custody for an alleged act of juvenile delinquency." As a 17-year-old, appellant came within the ambit of the statute. 18 U.S.C. §5031. Congress could hardly have intended to condone delayed arraignments or other deficiencies under §5033 (such as a failure to notify the juvenile's parents of an arrest) whenever the child is charged with a serious crime or for some reason a transfer to adult status appears likely. Furthermore, the factors which are considered by a court under §5032*** in determining whether a transfer is appropriate have no applicability to the child's

*The transfer hearing was held one month after the arrest.

**Though the district court was correct in its observation that appellant was older than the defendant in Binet (op. at 9), he was the same age as Glover at the time of his arrest.

***The relevant part of §5032 states:

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

need for "independent, unbiased advice" (United States v. Binet, supra, 442 F.2d at 299). A juvenile who has not responded to past treatment or for whom there are no programs available may be liable for transfer to adult prosecution for those reasons, but may nevertheless require the procedural safeguards of the statute. This is especially so for one of appellant's extremely low intelligence and history of emotional problems.

Because of the failure to take appellant before a magistrate "forthwith," as the statute (as well as the arrest warrant) commands, his confession must be suppressed.

B. The failure to allow appellant to confer with his guardian or to ascertain whether she understood the Miranda warnings requires reversal.

Between the time of appellant's arrest and arraignment, during the period when the confession was extracted, appellant's grandmother and legal guardian twice called the arresting officer to determine appellant's whereabouts. Again, when Arthur Rucks, the pretrial services officer, called to verify the bail information, appellant's grandmother asked Mr. Rucks to call her back with the results of the court appearance. Though, as the district court found, the grandmother exhibited grave concern for her grandson" (op. at 8), she was effectively prevented from assisting him.

Section 5033 provides, in relevant part:

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

Though appellant's grandmother was present at his arrest when he was told of the charges and informed of his rights, the detectives made no effort to ascertain whether she understood the Miranda warnings. See Commonwealth v. Smith, 372 A.2d 797 (Pa.Sup.Ct. 1977) (a juvenile's waiver of his Fifth and Sixth Amendment rights is ineffective unless the State establishes

that he had the opportunity to consult with an adult interested in his welfare and that the adult understands the rights of the minor). Nor did the Government establish that she was accorded the opportunity to consult with appellant before he was taken from the house. Certainly, the grandmother was not informed by any of the federal authorities of her grandson's whereabouts or permitted to attend his questioning. Though the statute requires notification of a guardian, the Assistant United States Attorney, after reviewing the Juvenile Delinquency Act, contacted a probation officer to attend the questioning. Neither the Assistant nor the FBI agents tried to contact the grandmother at any time. The presence of the probation officer -- another representative of the Government who was a silent witness to the interrogation -- not only failed to safeguard appellant's rights, but added to the coercive atmosphere. See People v. Maes, 571 P.2d 305 (Colo.Sup.Ct. en banc 1977) (where presence of a parent or guardian is required by statute at the interrogation of a juvenile, the presence of a social worker is an inadequate substitute).

To effect the mandate of §5033, the arresting officers must ascertain not only that the juvenile understands his rights, but also that the adult comprehends them. Moreover, the guardian must be given an opportunity to consult with the youth and to be present at his interrogation. The failure of the agents and prosecutor to comply in any meaningful way with the requirement of the statute invalidates appellant's confes-

sion.*

C. The statements made prior to the transfer hearing must be suppressed.

The final paragraph of 18 U.S.C. §5032 provides:

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

Since appellant's statements to Assistant United States Attorney Flannery were made prior to the transfer hearing, the confession should not have been admitted at his trial.

Judge Cannella refused to disallow the confession on this ground, following instead the holding in United States v. Spruille, 544 F.2d 303 (7th Cir. 1976), and United States v. Cheyenne, 420 F.Supp. 960 (D.S.D. 1976), affirmed, 558 F.2d 902 (8th Cir. 1977), that the provision "meant to prohibit only those statements made by a juvenile in connection with a transfer hearing." * Op. at 5-6. This is not so much an interpretation of the statute as a complete rewriting of it. That this is an erroneous view of the

*There is also an absence of proof that the authorities gave appellant his rights in a comprehensible manner. Appellant was given standard Miranda warnings on all occasions. Though appellant had prior encounters with the law, his limited intelligence may have prevented him from understanding the warnings. The fact that he answered "yes," "nodded," or "grunted" in response to the warnings hardly establishes that he comprehended the warnings.

**Appellant's statements were, in fact, admitted into evidence at his transfer hearing (T.28-31).

meaning of the provision is manifested by the legislative commentary, which states, "Statements made prior to a transfer to criminal prosecution are made inadmissible for the purposes of any criminal prosecution." 1974 U.S. Code Cong. & Admin. News 5320. The district court rejected the unambiguous meaning of the statute because under such a view "statements given by the older and more mature juveniles who are the subject of transfer hearings would be suppressed while, at the same time, statements of younger and more inexperienced juveniles would be freely admitted into evidence at their trials." Op. at 6. See also United States v. Cheyenne, supra, 558 F.2d at 907; United States v. Spruille, supra, 544 F.2d at 307. The court failed to perceive that the younger juveniles would be treated within the more benign provisions of the Juvenile Delinquency Act (see, e.g., 18 U.S.C. §§5034-5042),* while those, like appellant, who are transferred to adult status, face the possibility of obtaining criminal records and serving 25-year prison sentences.

The Federal Juvenile Delinquency Act represents an attempt "to provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes, and court decisions" -- to enact "a model code for juveniles." 1974 U.S. Code Cong. & Admin. News 5284, 5312. For years prior to the legislation, the District of Columbia followed a rule identical

*The admission of those treated within the Act are not "freely admitted," but must still meet constitutional standards. In re Gault, 387 U.S. 1 (1967).

to that in §5032, barring from criminal prosecutions all statements of a juvenile made prior to his transfer to adult status. Harrison v. United States, 359 F.2d 214 (D.C. Cir. en banc 1965); Harling v. United States, 295 F.2d 161 (D.C. Cir. en banc 1961). The statute is thus not an anomaly, but a reasonable attempt to safeguard the rights of juveniles.

The provision in question is drafted in simple and unambiguous language, which is reiterated in the legislative history. In defending its interpretation of §5032, which was relied upon by the court below, the Seventh Circuit explained that "[s]tatutory construction is at best an imperfect science," United States v. Spruille, supra, 514 F.2d at 305. However, to ignore the clear mandate of the legislature would seem to make it more "imperfect" and less a "science." As Mr. Justice Holmes aptly observed, "there is no canon against using common sense in construing laws as saying what they obviously mean." Roschen v. Ward, 279 U.S. 337, 339 (1929).

D. The confession was involuntary.

Appellant, a 17-year-old with an I.Q. of 57 and a history of emotional problems, was questioned in the absence of a lawyer or relative. In fact, his arraignment was deliberately delayed so that the Government could secure a confession. He was confronted with four representatives of the Government, and at the outset was told:

You've been arrested for violation of the Bank Robbery Statute. It is a serious offense because it carries with it a very serious penalty involving 20 years and a \$1,000 fine.

(S.III 22).

The confession obtained in this manner was "not freely self-determined" (United States v. Pomares, 499 F.2d 1220, 1222 (2d Cir. 1974)) and should have been suppressed.

In determining the voluntariness of confessions, courts have long recognized that, where the accused is a child, "special care in scrutinizing the record must be used." Haley v. Ohio, 332 U.S. 596, 599 (1948). In such cases, great weight has been accorded the fact that during the questioning no friend or counsel was present. Id., 332 U.S. at 600. As the Supreme Court noted in Gallegos v. Colorado, 370 U.S. 49, 54 (1962), "A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not." Empirical study has demonstrated that police custody undermines a juvenile's understanding of his rights, for "knowledge is often

subordinate to [one's] mental state at the time of arrest confrontation." Ferguson & Douglas, A Study of Juvenile Waiver, 7 San Diego L.Rev. 39, 51 (1970). In the instant case, appellant had a grandmother who was concerned about him, but she was sedulously excluded from the interrogation room. See United States v. Fowler, 476 F.2d 1081, 1093 (7th Cir. 1973).

Appellant's inability to make a self-determined waiver of his rights is dictated further by his condition as one "of low mentality, if not mentally ill." Fikes v. Alabama, 352 U.S. 191, 196 (1957); see Blackburn v. Alabama, 361 U.S. 199, 208 (1960); see also Reck v. Pate, 367 U.S. 433 (1961). Appellant's I.Q. was 57, defined as a "very serious handicap" and close to a mental defective. If, as several probation officers testified, appellant's score was lowered by his emotional problems, the same instability would have prevented him from dealing responsibly with his interrogators. Appellant certainly had far from a normal childhood:* he had been on home study for years and later attended a school for children with learning disabilities; occasionally sedatives were necessary for him to be able

*Appellant's mother had been hospitalized because of narcotic and emotional problems, and medical evidence corroborated appellant's account that he had been tortured by his mother's paramour (T.73, 81).

to function in a classroom.*

The circumstances of appellant's questioning were designed to break down his will. He was confronted by four Government officials: an Assistant United States Attorney, two FBI agents, and a probation officer. The prosecutor told appellant at the outset that he faced a possible 20-year sentence and a \$1,000 fine. A similar remark addressed to an adult has been held to mandate suppression. United States v. Duvall, supra, 537 F.2d at 24-25. As in that case, the prosecutor knew that such a penalty was not within the realm of reason for one of appellant's age. If such a statement by a Government attorney could overwhelm an adult, its impact is incalculably greater upon an adolescent. See Haley v. Ohio, supra, 332 U.S. at 599. Because of appellant's age, background, and inability to confer with an adult, the confession was taken in deprivation of his right to due process.

*Though the court's denial of the suppression motion relied to a great extent upon Judge Briant's earlier decision at the transfer hearing (op. at 9, 10), it is not clear whether Judge Cannella was aware of the facts concerning appellant's mental condition which were elicited at that hearing. However, the issue of voluntariness was clearly raised below (see S.I 37), and this Court may review the record of the transfer hearing as readily as the district court. See Blackburn v. Alabama, supra, 361 U.S. at 209-210. In Blackburn, the Supreme Court refused to restrict the scope of review of the record because "[w]here the involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment of conviction without exclusion of the confession." Id., 361 U.S. at 210.

As the prosecutor's remarks to the jury reveal, appellant's confession was the cornerstone of the Government's case. There was no eyewitness testimony and a conspicuous absence of corroborative proof. The only other evidence linking appellant to the crime was the contradictory testimony of the two accomplices, both of whom had prior convictions and pending sentencings. The importance of the confession to the prosecution is further revealed by the fact that the only testimony the jury requested during deliberations was that of the agent concerning the confession. Because the evidence was so crucial to the Government's case, the error could not be deemed harmless and a new trial is mandated.

Point II

THE SENTENCE IMPOSED ON COUNT TWO MUST BE
VACATED.

Because 18 U.S.C. §2113(a) is a lesser-included offense of 18 U.S.C. §2113(d), upon conviction of both, the crimes merge, and sentence may be imposed only on the latter. Prince v. United States, 352 U.S. 322, 329 (1957); United States v. Gaddis, 424 U.S. 544, 549 n.12 (1976); United States v. Mariani, 539 F.2d 915, 917 (2d Cir. 1976), and cases cited therein; United States v. Oliver, 523 F.2d 253, 260 (2d Cir. 1975); United States v. Stewart, 523 F.2d 1263, 1264 (2d Cir. 1975).

It is settled law in this Circuit that while simultaneous judgments of conviction under more than one subsection of the Federal Bank Robbery Act may be entered, 'simultaneous sentences, whether concurrent or consecutive, under subsections (a) and (d) [of 18 U.S.C. §2113] are improper.'

United States v. Mariani,
supra, 539 F.2d at 917,
quoting United States v.
Stewart, supra, 523 F.2d at
1264.

By sentencing appellant on Counts Two and Three, the district court here imposed such a prohibited "simultaneous" sentence on the violations of the two applicable subdivisions of 18 U.S.C. §2113. Accordingly, the sentence imposed on Count Two (violation of §2113(a)) -- the lesser-included offense -- must be vacated. United States v. Stewart, supra, 513 F.2d at 961; United States v. Gaddis, supra, 424 U.S. at 549 n.12; Prince v. United States, supra, 352 U.S. at 329.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed, the confession suppressed, and a new trial ordered. In the alternative, the sentence imposed on Count Two must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

February 6, 1978

corrected

I certify that a copy of this brief [REDACTED] has been mailed to the United States Attorney for the Southern District of New York.

Bary Bassis

